IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Writ petition No. 356 of 2001

Murari Lal Shah …… Petitioner.

Versus

IV A.D.J. and others……. Respondents.

Date of decision: 24, December 2004

For the approval of:

Hon'ble Mr. Justice P.C. Pant.

- Whether the order/judgment should be sent to the reporters for reporting? (Yes)

- Whether the reporters be allowed to see the judgment? (Yes)

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Civil Misc. Writ Petition No. 356/2001 (M/S)

Murari Lal Sah
S/o Hira Lal Sah
R/o Radha Sadan
Conniston Compound
Talli Tal, Nainital …….Petitioner

Versus

1. IV Additional District Judge, Nainital.

2. The Prescribed Authority/Munsif, Nainital.

3. Shri Kishore Lal Sah
S/o Gauri Lal Sah
R/o Gauri Niwas, Tallital, Nainital.

…....Respondents

Shri V.K. Bisht, Sr. Advocate assisted by Shri H.P. Srivastava, learned Sr.counsel for the petitioner.
Shri Z.M. Naqvi, learned counsel for the respondent No. 3.

Hon'ble Prafulla C. Pant, J.

By means of this writ petition, moved under article 226 of Constitution of India, the petitioner-landlord has sought writ in the nature of certiorari quashing the judgment and order dated 29.02.1992, passed by Shri A.K. Srivastava, the then learned IV Additional District Judge, Nainital, whereby he has allowed Rent Control appeal no. 40 of 1989 and rejected the release application, moved by the landlord under section 21 of U.P. Act 13 of 1972.

2. Brief fact of the case as narrated in the writ petition are that the petitioner-landlord filed an application under section 21 (1) (a) of the Act (copy Annexure No. 1 to the writ petition) before the Prescribed Authority for release of his shop No. 76, Tallital, Nainital (hereinafter referred to as the ‘premises in question’) with the plea that he is the owner landlord of the said premises and the respondent no. 3/opposite party, Shri Kishori Lal Sah, is a tenant from month to month. It is further alleged in the petition that the petitioner has purchased the shop vide registered sale deed dated 31.01.1981 and the purpose of buying the shop was the pressing need of the petitioner to carry on his business in the shop as he has no independent business of his own. The alleged ground for seeking release of premises in question is that the petitioner is only working in the shop of his brother in the capacity of a partner and that his brother wants to carry on independent business and intends to dissolve the partnership. It was further stated that the petitioner has not independent business of his own and the ‘premises in question’ are required by the petitioner for the purpose of doing his own independent business so that he may meet then need and requirement of his family members consisting of his wife and two sons. Also, it is alleged that no hardship will be caused to the respondent No.3/opposite party if the application for release is allowed as the opposite party has as many as seven shops which he has let out to different persons on rent. Besides it is also alleged that the opposite party runs a hotel in which he is doing brisk business and he has also let out suites to holiday

home and is fetching a very handsome sum from the said building and shops.

3. A written statement was filed by the respondent/opposite party before the Prescribed Authority, opposing the release application on the ground that he has been running the business of restaurant from the ground floor of the tenanted premises and that the first floor is being used as residence from the beginning. It was also alleged by the respondent that premises in question from where he runs his restaurant business is situated in a busy market adjacent to bus-station Tallital and he has earned a considerable goodwill. On the other hand, the shops in the ground floor of hotel ‘Gauri Niwas’, of which he is the owner, are locality shops, situated at higher altitude and there is no market like the premises in question and hence running a restaurant business at such a place would not compensate the answering respondent. Respondent no. 3 also stated in his written statement and counter affidavit that rent from his shops an other accommodations is meager and the premises in question is the only source of livelihood of the families of the respondent himself and of his son. The respondent/tenant also opposed the release application alleging that the petitioner has no need of the premises in question as the petitioner is doing a good business from the grocer’s shop. It is also alleged on behalf of respondent that the petitioner has a big shop below Vishal Cinema hotel and he also runs ‘Naini Hotel’ comprising about 10 suites which is an effluent source of income.

4. The learned Prescribed Authority recorded findings of bonafide need and comparative hardship in favour of the petitioner/landlord on the basis of evidence adduced before it in support of averments made in the pleadings by both the parties and allowed the release application. Aggrieved by which the tenant-respondent no.3, preferred appeal under section 22 of U.P. Act, 13 of 1972, which was allowed by learned IV Additional District Judge, Nainital. Hence this writ petition.

5. I heard learned counsel for the parties and perused the record of lower court apart from affidavit, counter affidavit and rejoinder affidavit alongwith annexures annexed thereto filed before this Court.

6. The question for consideration before this Court is whether the impugned judgment and order passed by the learned appellate court suffers from any illegality. And this Court is also required to look into the controversy if the findings of the fact arrived at by the learned appellate court (respondent no. 1) as to the bonafide need and hardship are perverse or suffer from manifest error of law?

7. Earlier this writ petition was decided, vide order dated 24.02.2003. Against which the respondent-tenant filed civil appeal no. 686-687 of 2004 before the Hon'ble Supreme Court, which was allowed on February 3, 2004 and the case was remanded for fresh decision. Hon'ble the Apex Court, while remanding the case has observed "unless and until the High Court had reversed the finding on the question of bonafide requirement recorded by the appellate authority against the respondent, the High Court

could not have directed eviction solely by recording a finding on the question of comparative hardship".

8. Learned counsel for the contesting respondent, raised the first objection, contending that the High Court is not a court of appeal and it cannot reverse the finding of fact recorded by the lower appellate court. In this connection, my attention was drawn to the principle of law laid down in Ashok Kumar and others Vs. Sita Ram 2001 (2), Allahabad Rent Cases, page 1. Undoubtedly, this Court is not a court of appeal for the purposes of release application, moved under Section 21 (1) (a) of U.P. Act, 13 of 1972 but under writ jurisdiction, it can certainly interfere if the findings of the trial court or appellate court are found to be perverse or vitiated by a manifest error of law. Here, it is pertinent to mention that the learned Prescribed Authority found need of the landlord genuine and bonafide, which was reversed by the learned appellate court. Learned counsel for the petitioner submitted before this Court that the learned lower appellate court has not given the reasons for reversing the finding of the Prescribed Authority. Perusal of the record shows that issue no. 4, framed by the learned Prescribed Authority related to the question of bonafide need of the landlord, regarding which learned lower appellate court after discussing the issue has mentioned that it is of the opinion that landlord has not succeeded in proving his need bonafide However, it is not clearly mentioned if the reasons mentioned by the Prescribed Authority for giving its affirmative finding on issue no. 4 were wrong. On behalf of the petitioner, my attention was drawn to the case law given in Moeed Khan alias Guddu

Vs. IIIrd Additional District Judge, Bareilly and others, 2001 (1) A.R.C. 314. In said judgment, it has been observed- “the Appellate Authority has to traverse upon, the reasons given by the Prescribed Authority and point out the drfect therein if it want to reverse the finding recorded by the Prescribed Authority.” In the present case no such defect appears to have been pointed out by learned appellate court.

9. Learned counsel for the petitioner submitted that the partnership business which was being run by him along with two other brothers was not sufficient for their growing family and it had been decided by the partners that the petitioner should separate from partnership firm and set up his own independent business in the shop owned by him. From the affidavits on record, it is established that the firm ‘M/S Darshan Brothers’ was not exclusively owned by the petitioner. It is further submitted on behalf of the petitioner that there was no requirement under the law to indicate the nature of the business proposed to be started by the petitioner-landlord and as such the negative finding recorded by the learned appellate court on said ground is against the law. To support his contention, my attention was drawn to the principle of law contained in Raj Kumar Khaitan and others Vs. B.B. Jubeda Khatoon and another, AIR 1995 SC 576 and Raghunath G. Panhale Vs. Chaganlal Sundarji and Co. (1999) 8 SCC 1. I have gone through the aforesaid judgment and found that the finding of bonafide need by the appellate court is against the principles of law. The finding as to the exclusive ownership of ‘Naini Hotel’, belonging to the petitioner

appears to be contrary to the evidence on record which as per the affidavit appears to have been owned by as many as five brothers and one of the brothers is the father of the petitioner. As such from the affidavits on record, it is only 1/15th share owned by the petitioner in said hotel. It is also relevant to mention here that since 1988 when the release application was moved, the minor sons of the petitioner have now grown up and they have to run their own business. In view of these facts, the need of landlord is nothing but bonafide. For the reasons, as mentioned above, the finding of the appellate court by which the finding of the trial court was reversed, cannot be sustained particularly for the reason that it erred in law in observing that the need can be said to be bonafide only if the landlord or his family members was un-employed or without any occupation. Learned counsel for the contesting respondent drew any attention to the principle of law laid down in Sudha Agrawal Vs. Xth Additional District Judge 1999 (2) SCCR 507, and submitted that it is not sufficient for the landlord to only allege the bonafide need but it should be proved also. In the opinion of this Court, above case law does not help the respondent no. 3 for the reason that in the present case not only the need is alleged but proved from the affidavits on record.

10. Learned counsel for the respondents, drew my attention to the rule 16 (2) (a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction), Rules, 1972 in which it is mentioned that greater the period since when the tenant has been carrying on his business, lesser the

justification for allowing the application. First of all, I may mention that said rule is guiding principle and not a mandatory provision. If this rule is strictly adhered to, then none of the old tenants of any landlord can be evicted. This is not the intention of the rule. Where in the family of landlord, children are grown up, they will be deprived of their right to start their business. I do not agree with the contention of the learned counsel for the contesting respondent that since the petitioner is Income Tax payee, only for augmenting his income, he has moved this application. In Brij Nandan Saran Vs. Additional District Judge 1978, Allahabad Rent Cases, Pg. 236, it has been held that every citizen is entitled to expand his business and increase his income and such need cannot be thrown out as not bonafide. Not only this, in Raghvendra Kumar Vs. Prem Machinery (2000) 1 S.C.C 679, the apex court has held that the landlord is the best judge of his own requirement and the court has only to see if the same is genuine. Shri Z.M. Naqvi, learned counsel for the respondents, referred before me the case of Chhetriya Sri Gandhi Ashram, Meerut Vs. IInd Additional District Judge, Meerut, Allahabad Rent Cases, 1998 (2) 373 in support of his contention that only the facts as it stood on the date of application should be looked into. With due regard to the view expressed by learned Single Judge of Allahabad High Court, I find myself unable to accept the view for the reason that for doing the justice between the parties, the Court can see atleast those developments which have arisen out of the pleas in the original petition. The children who were minor at the time of filing release application in the

year 1988, cannot be treated still minor today, in the year 2004.

11. Now, I come to the second legal point that is relating to comparative hardship between the parties. From the evidence on record, it is clear that the tenant-respondent, owns a big hotel named ‘Gauri Niwas’ in which there are several shops in the ground floor. Learned counsel for the respondents, submitted that the said hotel and shops are not in the main market of Nainital as such respondent-tenant cannot conveniently shift there. However, the argument of the learned counsel gets diluted in view of the fact that there is a Commissioner’s Report dated 02.09.2002 at page 350-351 of this writ petition, which indicates that no substantial loss would be caused to the tenant if he shifts business from the shop in question to other alternative place. In the said report, it is also mentioned that hotel ‘Gauri Niwas’ is surrounded by many hotels like Punjab Hotel, Man Sarowar Hotel, Lake View Hotel, Metro Hotel, Upadhyay Hotel, Vinayak Hotel and Welcome Resort. In view of the principle of law laid down in Bhawan Das Vs. Jilley Kuar and others 1991 Supp (2) SCC 300, in the circumstances, it cannot be said if in the present case the comparative harship of the tenant is bigger than that of the peritioner who intends not only to establish his own business, separating himself from his brothers, but also wants to establish his grown up sons for which he has no suitable accommodation.

12. For the reasons as discussed above, this Court is of the view that the findings as the bonafide need and comparative hardship arrived at by Learned appellate court,

suffer from manifest error of law. As such, the impugned judgment and order is liable to be quashed. Therefore, the writ petition is allowed. Impugned judgment and order dated 29.02.1992 passed by learned IV Additional District Judge, Nainital in Rent Control Appeal no. 40 of 1989 is quashed and the judgment and order of the Prescribed Authority in PA case No. 16 of 1988 is upheld. No order as to the costs.

(Prafulla C. Pant, J.)

Dt: December 24, 2004
Sweta